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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

**No. 217**

**E. F. HORNER,**

*Petitioner,*

*vs.*

**THE COUNTY OF WINNEBAGO AND A. R. CARTER,**

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT,  
SECOND DISTRICT, OF THE STATE OF ILLINOIS.

**REPLY BRIEF OF PETITIONER.**

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THE UNIVERSITY OF CHICAGO

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**A.**

The petition alleges that the federal questions sought to be reviewed were raised in the pleadings in the trial court, and in effect by the assignment of errors and argument, and the petition for rehearing, in the Appellate Court. The respondents contend that the petitioner has not specified what pleading raised the question.

The complaint alleges a continuing trespass to real property. It states, in substance, that in the year 1930, the defendants broke and entered the land of the plaintiff and seized and appropriated a part thereof, that said part so

seized and appropriated is a parcel 50 feet in width along the southerly side, fronting upon a public street or highway known as River Street and also as State Aid Route 16, that the defendants changed or altered the direction or course and the grade of said public street or highway, or a part thereof, so that said public street or highway, or a part thereof, passed over, across and upon said land, that from said date until the commencement of the action they used and maintained the same as a part of said altered public street or highway, and that said public street or highway was changed or altered without the consent of the plaintiff and without the institution of any proceedings so to do, or the award of any compensation for the land taken, or for the damage to the land not taken.

The Civil Practice Act provides that the first pleading by the plaintiff shall be designated a complaint. (Ill. Rev. Stat. 1947, Chap. 110, Par. 156.) The first pleading by the defendant shall be designated an answer. All objections to pleadings heretofore raised by demurrer shall be raised by motion. (Ill. Rev. Stat. 1947, Chap. 110, Par. 169.) Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, and he may within the same time, file a similar motion supported by affidavits where any of the following defects exist but do not appear upon the face of the complaint: \* \* \* (e) That the cause of action is barred by a prior judgment. (f) That the cause of action did not accrue within the time limited by law for the commencement of the action or suit thereon. \* \* \* If, upon the hearing of such motion the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; but if disputed facts are involved the court may deny the motion without prejudice and shall so deny it if

the action is one at law and the opposite party demands that the issue be submitted to a jury. (Ill. Rev. Stat. 1947, Chap. 110, Par. 172.)

In the instant case, the only pleading is the complaint. It contains a plain and concise statement of the pleader's cause of action. Not only does it state facts showing a continuing trespass to real property, but it states facts showing that private property was taken and damaged for public use without compensation.

The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. The trial court granted the motion. The suit was dismissed and judgment was rendered for the defendants.

The rights that were specially set up and claimed by the petitioner, were denied to him. The state deprived the petitioner of his property without due process of law, and denied to him the equal protection of the laws. The decision is reviewable in this court.

In its opinion the Appellate Court set forth a statement of the case. It contains, in substance, the facts stated in the complaint. Among them is the statement that they (the defendants) have used and maintained plaintiff's land as a part of the altered public street or highway without his consent and without instituting any proceedings so to do. The Appellate Court recognized that the complaint stated a cause of action. It also recognized that no proceedings had been instituted to take any of the land of the plaintiff for a public street or highway.

The petition contains a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment in question, the questions pre-

sented, and the reasons relied on for the issuance of the writ. The statement particularly discloses the basis upon which it is contended that this court has jurisdiction. It specifies the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the court.

It appears affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

The respondents contend that the statute of limitations is applicable to the cause of action. In support thereof, they cite certain viaduct, sanitary district and railroad cases. (Resp. Brief, 9-10.) There is a marked and distinct difference between the causes of action in these cases and the cause of action in the instant case. These cases relate to actions to recover damages to adjoining and other lands resulting from the erection of permanent structures but the instant case is an action to recover damages for a continuing trespass to real property which consists of the unlawful taking and use of the same. In the instant case the trespasser can restore the land to the owner at any time. The cases cited are not applicable.

#### B.

The respondents contend that there were no disputed facts, as on a motion to dismiss all facts well pleaded are to be taken as admitted for the purpose of the motion. (Resp. Brief, 11.) The petitioner stated that all facts well pleaded in the complaint are admitted by a motion to dis-



miss. (Pet. Brief, 11.) The affidavits and the facts well pleaded in the complaint show that disputed questions of fact were involved. Inasmuch as disputed questions of fact were involved and the action was one at law and the plaintiff demanded that the issues be submitted to a jury, the trial court erred in granting the motion to dismiss.

It does not follow that because the Appellate Court did not discuss "other points raised by the appellant" that no disputed questions of fact were involved.

### C.

This action was brought to recover damages for a continuing trespass to real property. The Appellate Court did not apply the principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co. v. City of Chicago*, 207 Ill. App. 244, and the cases therein cited. Although substantially conclusive effect is given to state court decisions upon the construction of state statutes, a federal question of substance is involved in the instant case. The equal protection of the laws is not achieved by and through the indiscriminate application of the statute of limitations.

As stated, the state court has decided a federal question of substance not heretofore determined by this court, and has decided it in a way not in accord with applicable decisions of this court. No cases have been cited because there have been no cases in point in this court. This court also needs no citation of cases that private property shall not be taken or damaged for public use without just compensation.

### Conclusion.

Through all the years since 1930 the defendants have retained the land of the plaintiff. Although it has been used and maintained as a part of a public street or highway, no compensation or offer of the same has been made. The defendants have admitted the wrongful acts. No attempt has been made to justify such acts. Their principal defense has been the statute of limitations.

Every principle of right and justice demands that just compensation shall be made to the plaintiff. However, aside from all such considerations, the Constitution of the United States and the Constitution and laws of the State of Illinois have so declared and the mandate thereof must not be disregarded.

This court should take jurisdiction.

Respectfully submitted,

JOHN R. SNIVELY,  
*Attorney for Petitioner.*